



State of New Jersey
DEPARTMENT OF COMMUNITY AFFAIRS
101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

PHILIP D. MURPHY
Governor

LT. GOVERNOR SHEILA Y. OLIVER
Commissioner

INTERIM ORDER

February 23, 2021 Government Records Council Meeting

David O'Sullivan
Complainant

Complaint No. 2019-193

v.

Borough of Montvale (Bergen)
Custodian of Record

At the February 23, 2021 public meeting, the Government Records Council ("Council") considered the February 16, 2021 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. The Custodian's failure to provide a specific lawful basis for denying access to the redacted portions of the responsive executive session meeting minutes was insufficient. N.J.S.A. 47:1A-5(g); Paff v. Borough of Lavallette, GRC Complaint No. 2007-209 (Interim Order dated June 25, 2008).
2. The GRC must conduct an *in camera* review of the executive session minutes responsive to the Complainant's OPRA request to determine the validity of the Custodian's assertion that the e-mails were exempt under the attorney-client privilege, "inter-agency, or intra-agency advisory, consultative, or deliberative material," and personnel exemptions under OPRA. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-10; N.J.S.A. 10:4-12(b)(7); Executive Order No. 26 (Gov. McGreevey, 2002); Attorney General's Internal Affairs Policy and Procedures. See Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346, 355 (App. Div. 2005).
3. **The Custodian shall deliver¹ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see conclusion No. 2 above), nine (9) copies of the redacted records, a document or redaction index², as well as a legal certification from the Custodian, in accordance with N.J. Court Rules, R. 1:4-4,³ that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**

¹ The *in camera* records may be sent overnight mail, regular mail, or be hand-delivered, at the discretion of the Custodian, as long as the GRC physically receives them by the deadline.

² The document or redaction index should identify the record and/or each redaction asserted and the lawful basis for the denial.

³ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.
5. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the
Government Records Council
On The 23rd Day of February 2021

Robin Berg Tabakin, Esq., Chair
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records Council.

Steven Ritardi, Esq., Secretary
Government Records Council

Decision Distribution Date: February 24, 2021

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
February 23, 2021 Council Meeting**

**David O'Sullivan¹
Complainant**

GRC Complaint No. 2019-193

v.

**Borough of Montvale (Bergen)²
Custodial Agency**

Records Relevant to Complaint: Electronic copies via e-mail of all closed session meeting minutes from January 2015 to December 2018.

Custodian of Record: Maureen Iarossi-Alwan
Request Received by Custodian: March 28, 2019
Response Made by Custodian: April 16, 2019
GRC Complaint Received: September 18, 2019

Background³

Request and Response:

On March 28, 2019, the Complainant submitted an Open Public Records Act ("OPRA") request to the Custodian seeking the above-mentioned records. On April 16, 2019, the Custodian responded in writing disclosing all approved closed session minutes for the applicable time frame with redactions made by the Borough of Montvale's ("Borough") "[a]ttorney."

Denial of Access Complaint:

On September 18, 2019, the Complainant filed a Denial of Access Complaint with the Government Records Council ("GRC"). The Complainant first asserted that there is no dispute that the records in question are "government records" for purposes of OPRA. The Complainant further contended that those minutes should have been disclosed without redactions because the Open Public Meetings Act ("OPMA") requires them to be readily available. N.J.S.A. 10:4-14; S. Jersey Pub. Co. v. N.J. Expressway Auth., 124 N.J. 478, 493 (1991). The Complainant argued that disclosure of meeting minutes is regardless of the topics discussed therein. Id.

¹ Represented by Walter M. Luers, Esq., of Cohn, Lifland, Pearlman, Herrmann & Knopf, LLP. (Saddle Brook, NJ).

² Represented by Joseph W. Voytus, Esq., of Boggia, Boggia, Betesh & Voytus (Ridgefield Park, NJ).

³ The parties may have submitted additional correspondence or made additional statements/assertions in the submissions identified herein. However, the Council includes in the Findings and Recommendations of the Executive Director the submissions necessary and relevant for the adjudication of this complaint.

The Complainant further argued that the Custodian failed to provide a specific lawful basis for the redactions but noted that they were made by the Borough's "[a]ttorney." The Complainant argued that because of the Custodian's failure to provide those bases, it is unclear whether the redactions fell within the attorney-client privilege. N.J.S.A. 47:1A-1.1. The Complainant noted that to the extent the attorney-client privilege is at issue, the Custodian must satisfy requirements set forth under N.J.R.E. 504 and N.J.S.A. 2A:84A-20 to withhold records under that exemption. The Custodian thus argued that the Council should require the Custodian to submit a document index and provide unredacted copies of the minutes for an *in camera* review. Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346, 355 (App. Div. 2005).

The Complainant finally argued that should the Council order disclosure of the minutes without redactions, he should be considered a prevailing party subject to attorney's fees. N.J.S.A. 47:1A-6; Mason v. Hoboken, 196 N.J. 51, 79 (2008).

Statement of Information:⁴

On June 19, 2020, the Custodian filed a Statement of Information ("SOI"). The Custodian certified that she received the Complainant's OPRA request on March 28, 2019. The Custodian certified that following an extension of time, she responded in writing on April 16, 2019 disclosing 173 pages of approved closed session minutes spanning the applicable time frame with redactions.

The Custodian argued that the redacted information fell under three (3) exemptions, with some overlapping one another. The Custodian asserted that the first exemption that applies to the redactions is the attorney-client privilege. N.J.S.A. 47:1A-1.1; N.J.S.A. 10:4-12(b)(7). The Custodian argued that the redacted material related to "pending or anticipated contract negotiations or litigation." The Custodian noted that over "70% of the 173 records . . . included discussions covered by the attorney-client privilege." The Custodian argued that many of the meeting topics contain attorney-client discussions regarding litigation, contracts, and personnel challenges. N.D. v. Rumson Fair-Haven Bd. of Educ., GRC Complaint No. 2003-56 (December 2003) (citing N.J.S.A. 10:4-12(b)(7)); Jones v. Rutgers, The State Univ. of N.J., GRC Complaint No. 2015-202 (Interim Order dated September 27, 2017).

The Custodian argued that the second exemption is for "inter-agency, or intra-agency advisory, consultative, or deliberative [(“ACD”)] material." N.J.S.A. 47:1A-1.1. The Custodian argued that the redactions protected pre-decisional discussions of Council, and other individuals where appropriate. The Custodian argued that a portion of the meeting topics contain ACD information such as appraisal discussions, contract negotiations, and settlement discussions.

The Custodian argued that the third exemption is for personnel information. N.J.S.A. 47:1A-10; N.J.S.A. 10:4-12(b)(8). The Custodian noted that the redactions protected a range of personnel discussions from "Rice" notices to hiring/promotional practices. The Custodian further noted that a few matters included employee privacy issues and internal affairs issues covered under Executive Order No. 26 (Gov. McGreevey, 2002) ("EO 26") and the Attorney General's Internal Affairs Policy and Procedures ("IAPP"). The Custodian argued that contrary to the Court's ruling

⁴ On September 30, 2019, this complaint was referred to mediation. On June 2, 2020, this complaint was referred back to the GRC for adjudication.

in S. Jersey Pub. Co. v. N.J. Expressway Auth., 124 N.J. 478, 493 (1991), the Complainant here did not prove that any of the matters fell within the personnel exceptions in N.J.S.A. 10:4-12(b)(8).

The Custodian finally argued that all redactions were made in a good faith effort to protect executive session discussions by lawfully redacting the responsive minutes. The Custodian noted that the detailed document index submitted as part of the SOI reflects this lawful denial. The Custodian thus argued that this complaint should be dismissed. The Custodian asserted that there is also no credible evidence in the record to support that a knowing and willful violation occurred or that the Complainant is a prevailing party.

Analysis

Sufficiency of Response

OPRA provides that “[i]f the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefor on the request form and promptly return it to the requestor.” N.J.S.A. 47:1A-5(g). OPRA also requires that, when providing access to redacted records, a custodian shall provide a specific lawful basis for redactions. Paff v. Borough of Lavallette, GRC Complaint No. 2007-209 (Interim Order dated June 25, 2008). See also Schwarz v. N.J. Dep’t of Human Serv., GRC Complaint No. 2004-60 (February 2005); Renna v. Union Cnty. Improvement Auth., GRC Complaint No. 2008-86 (May 2010).

Here, the Custodian disclosed 173 pages of redacted executive session minutes to the Complainant with redactions. However, the Custodian failed to include any specific lawful basis for this denial other than that the redactions were made by the Borough’s “attorney.” Factually, there are no exemptions in OPRA that allow for such a denial. Thus, the forgoing evidence of record here is on point with Paff, GRC 2007-209 and supports a finding that the Custodian’s response was insufficient.

Accordingly, the Custodian’s failure to provide a specific lawful basis for denying access to the redacted portions of the responsive executive session meeting minutes was insufficient. N.J.S.A. 47:1A-5(g); Paff, GRC 2007-209.

Unlawful Denial of Access

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request “with certain exceptions.” N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

In Paff, 379 N.J. Super. 346, the complainant appealed a final decision of the Council⁵ that accepted the custodian’s legal conclusion for the denial of access without further review. The Appellate Division noted that “OPRA contemplates the GRC’s meaningful review of the basis for an agency’s decision to withhold government records When the GRC decides to proceed with

⁵ Paff v. N.J. Dep’t of Labor, Bd. of Review, GRC Complaint No. 2003-128 (October 2005).

an investigation and hearing, the custodian may present evidence and argument, but the GRC is not required to accept as adequate whatever the agency offers.” Id. The court stated that:

[OPRA] also contemplates the GRC’s *in camera* review of the records that an agency asserts are protected when such review is necessary to a determination of the validity of a claimed exemption. Although OPRA subjects the GRC to the provisions of the ‘Open Public Meetings Act,’ N.J.S.A. 10:4-6 to -21, it also provides that the GRC ‘may go into closed session during that portion of any proceeding during which the contents of a contested record would be disclosed.’ N.J.S.A. 47:1A-7(f). This provision would be unnecessary if the Legislature did not intend to permit *in camera* review.

[Id. at 355.]

Further, the court found that:

We hold only that the GRC has and should exercise its discretion to conduct *in camera* review when necessary to resolution of the appeal . . . There is no reason for concern about unauthorized disclosure of exempt documents or privileged information as a result of *in camera* review by the GRC. The GRC’s obligation to maintain confidentiality and avoid disclosure of exempt material is implicit in N.J.S.A. 47:1A-7(f), which provides for closed meeting when necessary to avoid disclosure before resolution of a contested claim of exemption.

[Id.]

In the matter before the Council, the Complainant sought access to executive session meeting minutes from January 2015 through December 2018. The Custodian disclosed 173 pages of meeting minutes with redactions and later argued in the SOI that said information was exempt under the attorney-client privilege ACD, and personnel exemptions. The arguments for and against disclosure are discussed above.

Upon review of the evidence of record in the instant complaint, the GRC cannot determine whether the Custodian properly denied access to those redacted portions of the responsive meeting minutes. For this reason, a “meaningful review” is necessary to determine whether the redacted portions of the responsive minutes fall within the asserted exemptions. Paff, 379 N.J. Super. at 355. Further, the GRC has routinely reviewed executive session meeting minutes *in camera* in complaints with facts similar to the present complaint. See e.g. Paff v. Harrison Twp. Fire Dist. (Gloucester), GRC Complaint No. 2014-402 (Interim Order dated July 28, 2015).

Therefore, the GRC must conduct an *in camera* review of the executive session minutes responsive to the Complainant’s OPRA request to determine the validity of the Custodian’s assertion that the e-mails were exempt under the attorney-client privilege, ACD material, and personnel exemptions under OPRA. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-10; N.J.S.A. 10:4-12(b)(7); EO 26; IAPP. See Paff, 379 N.J. Super. at 346.

Knowing & Willful

The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Prevailing Party Attorney's Fees

The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. The Custodian's failure to provide a specific lawful basis for denying access to the redacted portions of the responsive executive session meeting minutes was insufficient. N.J.S.A. 47:1A-5(g); Paff v. Borough of Lavallette, GRC Complaint No. 2007-209 (Interim Order dated June 25, 2008).
2. The GRC must conduct an *in camera* review of the executive session minutes responsive to the Complainant's OPRA request to determine the validity of the Custodian's assertion that the e-mails were exempt under the attorney-client privilege, "inter-agency, or intra-agency advisory, consultative, or deliberative material," and personnel exemptions under OPRA. N.J.S.A. 47:1A-1.1; N.J.S.A. 47:1A-10; N.J.S.A. 10:4-12(b)(7); Executive Order No. 26 (Gov. McGreevey, 2002); Attorney General's Internal Affairs Policy and Procedures. See Paff v. N.J. Dep't of Labor, Bd. of Review, 379 N.J. Super. 346, 355 (App. Div. 2005).
3. **The Custodian shall deliver⁶ to the Council in a sealed envelope nine (9) copies of the requested unredacted records (see conclusion No. 2 above), nine (9) copies of the redacted records, a document or redaction index⁷, as well as a legal certification from the Custodian, in accordance with N.J. Court Rules, R. 1:4-4,⁸ that the records provided are the records requested by the Council for the *in camera* inspection. Such delivery must be received by the GRC within five (5) business days from receipt of the Council's Interim Order.**
4. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

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⁸ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

5. The Council defers analysis of whether the Complainant is a prevailing party pending the Custodian's compliance with the Council's Interim Order.

Prepared By: Frank F. Caruso
Executive Director

February 16, 2021